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On

Mergers in the Telecommunications Industry

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Thank you Chairman McCain, Ranking Member Hollings, and Members of the Committee. I appreciate the opportunity to testify before the Committee this morning.

As we enter the Information Age, the Department of Justice (DOJ), the Federal Trade Commission (FTC), and the Federal Communications Commission (FCC) are working together to ensure that the American public reaps the benefits of a robust and dynamic communications marketplace. Each agency has a distinct and vital role to play in this process.

As you know, the Telecommunications Act of 1996 charges the FCC with the critical function of *creating* competition in markets where it did not exist before. We have a statutory obligation to follow the pro-competitive and de-regulatory framework of the Act, and to ensure that markets move from monopoly markets to competitive ones and that all Americans have access to the digital tools of the next century.

The Department of Justice and the Federal Trade Commission administer the antitrust laws. They do not duplicate the statutes laid out by the Communications Act, nor do they create more competition. Instead, they protect *existing* competition from a few well-defined abuses, including mergers that "substantially lessen competition" and mergers that "tend to create a monopoly."

We have different laws for different agencies, and each of the three agencies has an important role to play in this process. And together the three agencies are working on behalf of consumers and Americans nationwide. The public spends billions of dollars on communications and entertainment services every year, and as such the public has a huge stake in the development of our nation's communications infrastructure. Congress understood this vital interest when it passed the 1996 Act and charged the Federal Communications Commission with ensuring that competition develops in all communications markets.

In the less than four years since passage of the Act, competition and growth in communications markets have grown more rapidly than anyone could have imagined. Companies are investing billions of dollars in advanced telecommunications networks in our urban and rural areas. And consumers are reaping the benefits of this competition and growth. Grandparents are now able to talk to their grandchildren hundreds of miles away at a rate of seven cents per minute. Husbands and wives enjoy the increased security that comes from travelling with a wireless telephone. And millions of Americans are discovering the convenience of doing their holiday shopping over the Internet.

This rapid growth of technology and services has taken place far more rapidly than anyone could have expected. Even greater progress would have been possible had the monopoly carriers put their energy into complying with the Act's market-opening provisions instead of challenging nearly every part of the Act and nearly every decision implementing the Act in nearly every court in the country.

As a result of these legal and technological changes, communications firms are understandably looking for ways to take advantage of increased economies of scale, which can lead to lower prices and higher quality services. They are also seeking to combine services into packages or bundles, which can benefit consumers through the convenience of "one-stop shopping." Communications firms see mergers as an important way to take advantage of changes in technology and changes in the marketplace.

"Good" mergers can spur competition by creating merged entities that can compete more aggressively and that can move more quickly into previously monopolized markets. If such competition develops, we can substantially deregulate the formerly monopolized markets, just as strong competition justified the substantial deregulation of the long distance and wireless markets. Thus, the focus must remain on eliminating bottlenecks and ensuring that consumers have adequate choices to ensure meaningful competition.

As Adam Smith pointed out, however, there will be no competition (and no invisible hand) if business owners are left to their own inclinations. Instead, they will quickly decide that cartels and monopolies are far better for their interests. "Bad" mergers are likely to slow the development of competition. "Bad mergers" have many anti-competitive harms, such as: eliminating firms that would have entered markets; raising barriers to entry; discouraging investment; increasing the ability of the merged entity to engage in anti-competitive conduct; and making it more difficult for the Commission and State Public Utility Commissions to monitor and implement pro-competitive policies. Accordingly, the public interest demands constraints on the ability of a handful of large communications to consolidate communications assets that our vital to our nation's economy.

Discussion of "the public interest" in merger cases too often focuses on the "interest" side of the equation—industry interests, shareholder interests and economic interests. The FCC, on the other hand, has a unique statutory responsibility to keep the "public" side of the equation—consumers—in sharp focus. The FCC is in many ways the last defense for consumers, and we have a statutory obligation to ensure that mergers will result in tangible benefits for American consumers, namely, more choices, lower prices, and new and better services.

Although many mergers may be beneficial to the public, it is the FCC's job to make sure that no transfers of control create a conglomerate so large and so dominant that it kills competition and undermines the intent of the Telecommunications Act of 1996.

If the Commission did not review mergers under the "public interest" standard, it would be possible under traditional antitrust analysis for all the regional Bells and GTE Corp. to merge into a single, national local phone company. The country might be taken back to the days of Ma Bell and her helpings of higher prices, poorer service and stifled innovation. And American consumers would suffer as a result.

In response to assertions that have been made in the press, I'd like to be clear that the Commission is not engaging in any "shakedowns" of companies who have merger applications pending before it. The Commission is standing up for American consumers by eliminating the harms that will be caused by transfers of control and ensuring that the benefits reach communications consumers. The Commission does this by working with the companies and consumers to arrive at conditions that preserve the benefits of mergers while eliminating or adequately mitigating their harmful effects. Particularly where markets are changing rapidly (as with new technologies), conditions like those adopted in the SBC-Ameritech case are the most effective way to ensured the development of competition and protect consumers.

The Commission clearly is following, and has long been following, adequate procedures and adhering to consistent, well-defined legal standards as set forth in the Administrative Procedure Act. As required by the APA, the applicants, opponents, and the public have the opportunity to make known their views and have their perspectives taken into account. The process is open, the Commission explains its decisions in writing, and all decisions are subject to judicial review. If the Commission were not already following adequate procedures and adhering to consistent legal standards, its decisions would have been reversed by the courts.

Like the common law—the law of property or contracts—the public interest test proceeds on a case-by-case basis. This is more efficient, and much less regulatory, than writing extensive rules attempting to anticipate every way in which any possible transaction might violate any part of the Communications Act or the FCC's rules. The public interest is a fundamental legal concept, akin to "good faith," "reliance," "negligence," and "compensation." As such, its meaning is inherently fact specific and can only be defined based on the circumstances of each individual case. This is particularly true in rapidly changing times. Accordingly, case-by-case analysis is often superior to writing volumes of rules attempting to explain the application of a legal standard to every conceivable fact pattern.

In the future, the application of the public interest test will be even more clear and predictable than today. I have asked our General Counsel, Chris Wright, to organize an intra-agency transaction team that will be in place by January 3, 2000 to streamline and accelerate the transaction review process. A primary goal is to supplement the case law explicating the application of the public interest test with written guidelines. In addition, we will be looking at ways to leverage the specialized skills of the staff involved in reviewing transactions to reduce the effort needed to ensure consistency between decisions and to minimize the resources needed for processing even the most complicated transactions.

The new intra-agency transaction review team will establish deadlines for rapid processing of transfers of control associated with transactions. The goal will be to complete even the most difficult transactions within 180 days after the parties have filed all of the necessary information and public notice of the petitions has been issued. Finally, the new team will also work to make the transaction review process even more predictable and transparent, so that applicants know what is expected of them, what will happen when, and the current status of their application. This is consistent with the focus of the restructuring of the FCC to operate in a flatter, faster, and more functional manner.